Y.A.M. TUNKU KAMARIAH AMINAH MAIMUNAH ISKANDARIAH SULTAN ISKANDAR

v.

Y.B. DATO JAMES LING BENG KING

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. D1-22-187-88]
3 MARCH 1989

BANKING: *Shares in bank - Sale of shares - Whether plaintiff can obtain specific performance of sale of shares - Agreement without prior approval of Minister of Finance - Section 23A Banking Act 1973.*

CONTRACT: *Sale of shares in bank - Prior approve of Minister of Finance required - Object of sale agreement - Specific performance of sale agreement - Whether available without prior approval of Minister of Finance - Contract Act 1950.*

CIVIL PROCEDURE: *Interim injunction - Principles to be applied - Non disclosure of material facts - Section 23A of Banking Act 1973 - Illegality pursuant to s. 24(e) of Contracts Act 1950 - Specific performance of agreement.*

The defendant offered to sell to the plaintiff one million shares in Kong Ming Bank Berhad for the consideration of RM9 million. On 16 May 1988, the plaintiff accepted the share offer and advanced RM2 million to the defendant as deposit for the sale. However, the sale did not go through. The plaintiff commenced a civil suit seeking specific performance by alleging breach of agreement and subsequently obtained an injunction restraining the defendant from entering into any agreement with any party other than the plaintiff.

Accordingly the defendant filed an application to set aside the interim injunction and at the same time applied to strike out the plaintiffs writ of summons and statement of claim pursuant to O. 18 r. 19 of the High Court 1980. The defendant's application was based on 3 grounds: (a) In law, the plaintiff could not obtain specific performance; (b) Pursuant to s. 23 of the Banking Act 1973, any agreement to acquire a shareholding which when aggregated with existing shareholding would amount to not less than five percentum of the issued share of a licensed back must have the prior approval of the Minister of Finance upon the recommendation of the Central Bank. In addition, there was also violation of s. 24(e) of the Contracts Act 1950, (c) There has been non-disclosure of material facts.

The defendant admits that there was on 16 May 1988 an agreement when the plaintiff accepted the defendant's offer and advanced him the RM2 million deposit. However, the defendant contended that the agreement was unlawful because there was no approval by the Minister of Finance for the sale of the shares under s. 23A of the Banking Act. Further the object of the said agreement was opposed to public policy pursuant to s. 24(e) of the Contracts Act. The defendant revealed that a letter was in fact written by the plaintiff's former solicitor (a copy of which was sent to the plaintiff) to the Governor to Bank Negara on 13 June 1988 for approval of the sale. This was not disclosed to the Court when the plaintiff applied for the injunction and neither was s. 23A brought to the attention of the Court. The defendant urged the Court, to dissolve the injunction based on the nondisclosure of material facts.

In reply, the plaintiff contended that without a formal agreement, the plaintiff could not apply for approval and stated that there were serious questions to be tried and that there must be an interim injunction pending disposal of this suit.

Held:

[1] There was non-disclosure of material facts especially the vital letter written by the plaintiff's former solicitor and also the failure of the plaintiff's present solicitor to draw the Court's attention to s. 23A of the Banking Act 1973 and to the fact that up to the present date there has been no approval from the Minister of Finance for the said agreement.

[2] Section 23A of the Banking Act is clear and comprehensive in prohibiting a person from entering into any arrangement or agreement to acquire a shareholding which when aggregated with existing shareholding would amount to not less than five percentum of the issued shares of a licensed bank without obtaining the **prior** approval of the Minister of Finance, upon the recommendation of the Central Bank. The section covers arrangements or agreements, both formal and **informal,** express or implied.

[3] The plaintiff would not be able to obtain specific performance of the said agreement in view of s. 24(e) of the Contracts Act, as it is obviously a matter of public policy that the prior approval of the Minister of Finance under s. 23A must be obtained.

[Injunction set aside. Plaintiff's writ of summons and statement of claim be struck off. Plaintiff to pay costs.]

Cases referred to:
Vethanayagam v. Karuppiah & Ors. [1968] 1 MLJ 283
Mohamed Zainuddin bin Puteh v. Yap Chee Seng [1978] 1 MLJ 40
Cayne & Anor. v. Global Natural Resources plc [1984] All ER 225

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)
Banking Act 1973, ss. 23A, 24(1)
Contracts Act 1950, s. 24(e)

Other sources referred to:
Gareth Jones on Specific Performance, p. 83

For the applicant/defendant - Cecil Abraham & Seth; M/s. Shearn Delamore & Co.
For the respondent/plaintiff - Liew Teck Keong; M/s. Liew & Co.

JUDGMENT

Gunn Chit Tuan J:

This was an application by way of summons-in-chambers dated 1 November 1988, by Y.B. Dato James Ling Beng King (defendant) for an order that an injunction granted by me on 8 September 1988, restraining him from entering into any agreement with any party other than Y.A.M. Tunku Kamariah Aminah Maimunah Iskandariah bte. Sultan Iskandar (plaintiff) in respect of the sale of one million Kong Ming Bank Berhad shares including the 1.2 million shares acquired under the rights issue of the said shares held by the defendant until final determination of the suit filed by the plaintiff be set aside.

There was also an application that the plaintiff's writ of summons and the statement of claim both dated 7 September 1988, be struck out pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of this Honourable Court as the writ

of summons and statement of claim disclose no reasonable cause of action, may prejudice, embarrass or delay the fair trial of the action or are otherwise an abuse of the process of this Court.

The other orders applied for were that a date be fixed for assessment of damages, and that the plaintiff do pay to the defendant the costs of the application.

Mr. Cecil Abraham, leading Counsel for the defendant at the commencement of his address pointed out that the plaintiff who applied for an interim injunction on 8 September 1988 never disclosed to the Court a letter dated 13 June 1988 written by the plaintiff's former solicitors' M/s. Skrine & Co., to the Governor of Bank Negara to seek the approval of the Minister for the sale of the said shares pursuant to s. 23A of the Banking Act 1973. Counsel then stated that the defendant's application was based on three grounds. The first ground, he submitted was that in law the plaintiff could not obtain specific performance of the agreement between her and the defendant, secondly, he referred to s. 23A of the Banking Act 1973 which is as follows:

> 23A. Acquisition of an aggregate of five per centum holding.
>
> (1) without prejudice to s. 23 and s. 24 and subject to s. 23R, no person shall enter into an arrangement or agreement formal or informal, expressed or implied, to acquire any interest in the shares of a licensed bank incorporated in the Federation by which he would, if the arrange-
>
> (2) An application for approval under this section shall be sent to the Central Bank and thereupon the Central Bank shall submit such application with its recommendation to the Minister.
>
> (3) The provision of this section shall apply *mutatis mutandis* any subsequent arrangements or agreements to acquire any interest in shares of such licensed bank incorporated in the Federation additional to those in respect of which an approval by the Minister was given under this section.

and Submitted that under Sub-section (1) of the said section, any agreement or arrangement for the sale of shares in a bank must have the prior approval of the Minister of Finance. He pointed out that in this case there was also violation of s. 24(e) of the Contracts Acts 1950, which is as follows:

> 24. The consideration or object of an agreement is lawful, unless:
>
> (a) x x x
>
> (b) x x x
>
> (c) x x x
>
> (d) x x x
>
> (e) the Court regards it as immoral, or opposed to public policy.

His third ground was that there had been non-disclosure of material facts.

As regards non-compliance of s. 23A of the Banking Act 1973 and the contention that the object of the agreement was not lawful because it is opposed to public policy under s. 24(e) of the Contracts Act 1950, Counsel referred to the affidavit of the plaintiff affirmed on

ment or agreement is carried out, obtain an aggregate interest in shares of not less than five percentum of the issued shares of that licensed bank without the prior approval of the Minister to his entering into such arrangement or 7 September 1988 wherein it was averred,

inter alia, that sometime between 1 April 1988 and 26 April 1988, negotiations were conducted between her and the defendant for the sale of 1,000,000 shares in Kong Ming Bank Berhad held by the defendant. A consideration of RM9,000,000 was agreed upon for the said shares. During the course of the negotiations the defendant expressed his stipulation that RM2,000,000 was to be paid to him on acceptance of the offer of sale. On or about 26 April 1988 the defendant by a letter of the same date formally offered to sell to the plaintiff all his rights titles in the said shares and undertook to execute any sale and purchase agreement in reasonable terms to be drafted by her solicitors, M/s. Skrine & Co. On 16 May 1988 the plaintiff communicated her acceptance of the share offer and advanced RM2 million to the defendant of which RM500,000 was in cash and RM1.5 million in a Hong Kong & Shanghai Bank Cheque No. 263097 as deposit for the sale. Mr. Abraham stated that it was the contention of the plaintiff that on 16 May 1988 there was a contract. The defendant agreed that there was on 16 May 1988 an agreement when the plaintiff accepted the defendant's offer on that date for which she also advanced RM2,000,000 to the defendant as deposit for the sale. Counsel then pointed out on that day there was still no approval of the Minister of Finance for the sale of the said shares under s. 23A of the Banking Acts 1973.

He then referred to the following letter (Exhibit YLBK2 to encl. 8) which the plaintiff's former solicitors wrote to the governor of Bank Negara on 13 June 1988:

PM/jk/ll2784.7 SULIT
13 June 1988
The Governor
Bank Negara
Jalan Kuching
Kuala Lumpur

YB Tan Sri

Re: Purchase of Kong Ming Bank Shares.

We act on behalf of YAM Tunku Kamariah Mahmood Iskandar.

Our client is desirous of acquiring one million shares in Kong Ming Bank Berhad from Dato James Ling.

Pursuant to s. 23A of the Banking Act 1973, our client would be grateful for the approval of the Minister to entering into negotiations with Dato James Ling on this proposals.

If the Minister sees fit to grant his approval the details of the arrangement will, of course, be submitted for the Minister's approval before any formal agreement is entered into.

Yours faithfully,

c.c. client.,

and pointed out that the agreement in question between the parties was already entered into on 16 May 1988 but the above letter was only written to Bank Negara on 13 June 1988 and it was also not disclosed to the Court when the plaintiff applied for the interim injunction.

Counsel also submitted that the object of the said agreement was not lawful because of s. 24(e) of the Contracts Act 1950, and on the question of illegality he referred to the following passage in the judgment of Raja Azlan Shah J (as he then was) in *Vethanayagam v. Karuppiah & Ors.* [1968] 1 MLJ 283:

> Jurisdiction to grant a temporary injunction is always a matter of discretion which is to be exercised in accordance with well-know principles. An order for a temporary injunction can be sought only in aid of a prospective order or a perpetual injunction. If, therefore, in the event of plaintiff's success, he cannot obtain a decree for perpetual injunction, it is not competent for him to ask for a temporary injunction (see *Bishun Prashad v. Sashi Bhusan*). In other words, a temporary injunction will not be granted in cases where a permanent injunction is not available under ss. 52 to 54 of the Specific Relief (Malay States) Ordinance 1950. Section 54(f) enacts that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. This means that a Court will not grant an injunction to prevent the breach of a contract if the contract be such as cannot be specifically enforced under the provisions of Chapter II of the Ordinance, for example s. 20(b). The grant of injunction therefore is always guided by the same principles as the grant of specific performance of a contract, and if the contract is such as not to be capable of being specifically enforced, no injunction can be granted to prevent its breach.

Mr. Abraham then stated that a contract which was illegal because it involves the commission of a crime or tort or which is immoral or contrary to public policy, is void (see *Gareth Jones on Specific Performance* at p. 83). He then pointed out that s. 23A of the Banking Act was also not brought to the attention of the Court when the plaintiff applied for the interim injunction and referred to the following passage of the judgment of Hashim Yeop Sani J (as he then was) in *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40:

> The sole ground on which the notice of motion is based is of course as set out in para. (a) of the defendant's affidavit, that is to say, that the plaintiff had not stated the facts fully and accurately and that the plaintiff had not disclosed all material facts. It is an established law that the Court in an application of this nature must be satisfied that the person who asked for the interlocutory injunction did injunction there is no obligation upon him to ascertain what are the important facts of the case and it is no excuse to say that the party does not consider the facts to be important. The party applying for *exparte* injunction is bound to state not only the facts that he considers material but all facts within his knowledge that are material and therefore if it is shown that a plaintiff had innocently omitted to state circumstances which turn out to have material bearing upon his rights the injunction should be dissolved - see *Daglish v. Jarvie* [1978] 1 MLJ 40, 41.

Counsel ended his submission by stating that as the plaintiff had failed to disclose material facts to the Court, the interim injunction should be dissolved.

Mr. Liew, Counsel for the plaintiff also referred to the above quoted letter to the governor of Bank Negara and stated that at the time of application for the interim injunction, the plaintiff was not in possession of that letter. He then stated that even if the plaintiff's former solicitors, M/s. Skrine & Co. had written to the governor of Bank Negara, Bank Negara would not be able to entertain the application in the absence of any formal agreement being submitted to it for consideration. Mr. Liew also referred to the above quoted s. 23A of the Banking Act as well as to the following s. 24(1) of the said Act:

> 24.(1) Every licensed bank shall obtain the approval of the Minister of any proposed:
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> (a) arrangement or agreement - not mean to deceive the Court and
>
> (i) for the sale or disposal of its shares or business; or
>
> (ii) affecting voting power, management or other matter's,
>
> which will result in a change in the control or management of the bank;
>
> (b) ...,

and agreed that there, was an agreement on 16 September 1988 but stated that it had not yet been translated into a formal agreement. He contended that without a formal agreement the plaintiff could not apply to Bank Negara for the Minister's consent. He also stated that there were serious questions to be tried and that the *status quo* should be maintained and that there must be an interim injunction pending disposal of this suit.

In his reply, Mr. Abraham pointed that the above-quoted letter of 13 June 1988 to the governor of Bank Negara was copied to the plaintiff by M/s. Skrine & Co. He contended that it was therefore the duty of the plaintiff as a client to brief her new solicitors fully before applying for the interim injunction. On the question of whether there was an issue to be tried, Counsel referred to *Cayne & Anor. v. Global Natural Resources plc* [1984] 1 All ER 225 in which the UK Court of Appeal has held, *inter alia*, that for the purposes of an application for an interlocutory injunction there is a triable issue between the parties if there is a serious question to be tried (i.e., one for which there is some supporting material) of which the outcome is uncertain. It was his contention that in this case there was no triable issue between the parties as there is no serious question to be tried and it was clear that the plaintiff would not be able obtain specific performance of the agreement in question.

Having heard and considered this case I was satisfied that there was nondisclosure of material facts, especially the vital above-quoted letter written by the plaintiff's former solicitors, M/s. Skrine & Co. to the governor of Bank Negara. The plaintiff in her application for the interim injunction through her present solicitors had also failed to draw the Court's attention to s. 23A of the Banking Act 1973, and to the fact that up to the present date there has been no approval of the Minister of Finance for the said agreement pursuant to s. 23A of the Banking Act.

With respect to Counsel for the plaintiff, I considered that s. 23A of the Banking Act is clear and comprehensive in prohibiting a person from entering into any arrangement or agreement to acquire a shareholding which when aggregated with existing shareholding would amount to not less than five percentum of the issued shares of a licensed bank without obtaining the **prior** approval of the Minister of Finance, upon the recommendation of the Central Bank. It is also clear from that section that it covers arrangements or agreements, both formal and **informal**, express or implied. in this case the plaintiff would not be able to obtain specific performance of the said agreement in view of s. 24(e) of the Contracts Act, as it is obviously a matter of public policy that the prior approval of the Minister of Finance under s. 23A of the Banking Act must be obtained before any agreement or arrangement is entered into for the acquisition of an aggregate of five percentum holding in any licensed bank. In all the circumstances of the case and for the reasons stated, I therefore exercised my discretion in setting aside the interim injunction granted by me on 8 September 1988, and I also ordered that the plaintiff's writ of summons and statement of claim be struck off pursuant to O. 18 r. 19 of the Rules of the High Courts 1980. I also ordered, as prayed for, that a date be fixed for assessment of damages, and that the plaintiff do pay to the defendant costs of the said application.

Also found at [1989] 2 CLJ 244